Supreme Court, U.S.
FILED

95-267 AUG 15 1995

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1995

STATE OF NEBRASKA,

Petitioner,

v.

JOHN W. YELLI,

Respondent.

Petition For Writ Of Certiorari To The Nebraska Supreme Court

PETITION FOR WRIT OF CERTIORARI

Submitted by:

DON STENBERG
Attorney General

MARILYN B. HUTCHINSON
Counsel of Record
Assistant Attorney General
P.O. Box 98920
Lincoln, Nebraska 68509-8920
Tel: (402) 471-2682

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW

Is it inconsistent with this Court's holding in *Custis v. United States*, 511 U.S. ___, 128 L.Ed.2d 517, 114 S. Ct. 1732 (1994), and its precedents for the Nebraska Supreme Court to reverse and dismiss a conviction in a criminal action for nonsupport because orders, entered in prior civil paternity actions which did not show the defendant was represented by counsel or had waived it, were admitted to prove violation of those same court orders, an element of the crime.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS DELIVERED IN THIS CASE 1

GROUND FOR JURISDICTION 1

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 2

STATEMENT OF THE CASE 3

ARGUMENT 7

THE NEBRASKA SUPREME COURT HAS EXTENDED THE SCOPE OF COLLATERAL ATTACKS ON PRIOR JUDGMENTS BEYOND THE LIMITS RECOGNIZED BY THIS COURT AS NECESSARY FOR DUE PROCESS 7

A. The right to counsel 7

B. The right of collateral attack 8

C. The right of collateral attack is limited to sentencing proceedings where a prior conviction is offered to enhance the penalty for a subsequent conviction 9

D. The Nebraska Supreme Court extended collateral attacks beyond the limits recognized by this Court 11

CONCLUSION 14

TABLE OF AUTHORITIES

Page

CASES

Burgett v. Texas, 389 U.S. 109 (1967) 8

Carroll v. Moore, 228 Neb. 561, 423 N.W.2d 757 (1988) 4, 11

Custis v. United States, 511 U.S. ___, 128 L. Ed. 2d 517, 114 S. Ct. 1732 (1994).....6, 9, 10, 13

Gagnon v. Carpelli, 411 U.S. 778 (1973) 8

Gideon v. Wainwright, 372 U.S. 335 (1963) 7

Lassiter v. Department of Social Services, 452 U.S. 18 (1981) 7

Nichols v. United States, 511 U.S. ___, 128 L. Ed. 2d 745, 114 S. Ct. 1921 (1994).....8, 9

Scott v. Illinois, 440 U.S. 367 (1979) 7

State v. Yelli, 3 Neb. App. 148, 524 N.W.2d 353 (1994) 1

State v. Yelli, 247 Neb. 785, 530 N.W.2d 250 (1995) ..6, 12

United States v. Tucker, 404 U.S. 443 (1972) 8

STATUTES

28 U.S.C. § 1257 2

Neb. Rev. Stat. § 28-706(1) and (7) (1989) 2, 4, 11

CONSTITUTIONAL PROVISIONS

Constitution of the United States, Article V 2

Nebraska Constitution, Article I, sec. 3..... 2

OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS DELIVERED IN THIS CASE

The decision of the Nebraska Supreme Court in question here is reported at *State v. Yelli*, 247 Neb. 785, 530 N.W.2d 250 (1995). Appendix at App. 1.

That decision affirmed as modified the decision of the Nebraska Court of Appeals reported at *State v. Yelli*, 3 Neb. App. 148, 524 N.W.2d 353 (1994). Appendix at App. 20.

That decision reversed and vacated the unreported rulings and decision of the District Court of Holt County, Nebraska, Case No. 19654, overruling defendant's motion in limine, Appendix at App. 29, and motion to dismiss (based partly on that motion in limine) and finding defendant guilty of criminal nonsupport as charged. Those rulings are unreported.

GROUND FOR JURISDICTION

A.

The opinion of the Nebraska Supreme Court in question here was filed April 7, 1995.

B.

The State of Nebraska's motion for rehearing was filed April 11, 1995, and overruled by the Nebraska Supreme Court on May 17, 1995. (A motion for rehearing is timely under Rule 13.A. of the Nebraska Supreme Court if it is filed within 10 days of the release of the opinion.)

C.

Jurisdiction is conferred upon this Court to consider this matter by 28 U.S.C. § 1257 and Rule 13.1 of this Court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

> No person . . . shall be deprived of life, liberty, or property, without due process of law; . . .

Constitution of the United States, Article V.

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; . . .

Constitution of the United States, Article XIV.

> No person shall be deprived of life, liberty, or property, without due process of law.

Nebraska Constitution, Article I, sec. 3.

> (1) Any person who intentionally fails, refuses, or neglects to provide proper support which he or she knows or reasonably should know he or she is legally obliged to provide to a spouse, minor child, minor stepchild, or other dependent commits criminal nonsupport.
>
> . . .
>
> (7) Criminal nonsupport is a Class IV felony if it is in violation of any order of any court.

Neb. Rev. Stat. § 28-706(1) and (7) (1989).

STATEMENT OF THE CASE

The facts.

John W. Yelli was found in 1988 to be the father of a son and ordered to support him and in 1989 to be the father of a daughter and ordered to support her. He did not appeal those decisions and each became final. However, in 1993 when he was charged under Neb. Rev. Stat. § 28-706(1) with two counts of Criminal Nonsupport as a felony for violating those orders of support, he claimed it would be unconstitutional to use the orders as evidence in the subsequent criminal prosecutions brought to enforce them because they did not show he was represented by counsel or waived counsel. The district court overruled his objections and admitted the orders as evidence. A jury found defendant guilty as charged and he was convicted.

On appeal, the Nebraska Court of Appeals was persuaded by Yelli's argument analogizing his trial to a sentencing hearing where uncounseled prior convictions cannot be used to enhance the penalty for a subsequent conviction. Accordingly, it found the orders inadmissible, reversed his conviction and vacated the judgment of the district court. The Nebraska Supreme Court affirmed the judgment of the Court of Appeals except it directed the case to be dismissed.

The federal question.

The federal question posed to this Court was first presented to the District Court of Holt County, Nebraska, as a Motion in Limine in Case No. 19654. Defendant

asked the court to prohibit introduction or use of those orders "[s]ince defendant was not afforded counsel in those proceedings they were not constitutional orders according to the Constitution of the State of Nebraska." Although he did not mention in his motion a particular right or the federal constitution, in his argument to the court he relied first on *Carroll v. Moore*, 228 Neb. 561, 423 N.W.2d 757 (1988). In that case the Nebraska Supreme Court concluded that both federal and state due process dictate that an indigent defendant in a state-assisted paternity action has the right to the services of an attorney. Defendant in the present case argued a civil adjudication entered in a state-initiated paternity action when he was without counsel should not be used to prove a subsequent criminal action any more than a conviction in a criminal action can be used to enhance a subsequent conviction if the defendant was without counsel in the earlier proceedings and did not waive it. The district court found that right to counsel did not preclude the use of a judgment entered in a civil paternity case on a silent record (not showing either advisement of the right, waiver of the right, or any request to exercise the right) in a subsequent criminal case for criminal nonsupport under Neb. Rev. Stat. § 28-706(1). Appendix at App. 29.

At his jury trial, certified copies of two final judgments of paternity and child support were received over Yelli's objection on motion in limine grounds and the court overruled the objections.

Defendant's duty of support was shown not only by copies of those judgments but also in testimony to which Defendant did not object or which he elicited himself

through cross-examination of the mothers of the children he had not supported.

The record does not show Yelli was indigent at the time of the paternity proceedings or that he had asked for counsel. It does include facts from which an inference can be drawn that he was not indigent at that time.

When the Defendant moved to dismiss the action at the close of the state's case, partly on motion in limine grounds, the court overruled the motion. The defendant was convicted.

On appeal to the Nebraska Court of Appeals, the Defendant assigned one error: "admitting evidence from past paternity cases, where John Yelli did not have an attorney nor waive the right to an attorney." He argued he was denied due process when those judgments were used against him in a criminal nonsupport action.

The Nebraska Court of Appeals found Yelli's analogy to criminal enhancement proceedings persuasive. Appendix at App. 26. It held if the record in a state-initiated paternity action does not affirmatively show that the defendant was represented by or waived his right to counsel in the prior state-initiated paternity adjudication, the same defendant in a subsequent criminal nonsupport action may object to the use of the prior paternity adjudication as evidence of paternity. *Id.* It reversed and vacated the judgment of the district court. *Id.*

The State petitioned for further review of that decision by the Nebraska Supreme Court. It argued this Court has set limits to collateral attacks as a method of enforcing an indigent defendant's right to counsel so it was

error for the Court of Appeals to find it error to admit evidence of the prior paternity adjudications. *Id.* The Nebraska Supreme Court sustained that petition and granted further review. Appendix at App. 17.

On review, the Nebraska Supreme Court found the decision of the Court of Appeals did not permit the defendant to make a collateral attack on the former judgments of paternity, but to challenge their admissibility for being unreliable inasmuch as the defendant was not represented by and did not waive counsel in those proceedings. *State v. Yelli*, 247 Neb. 785, 788-795, 530 N.W.2d 250 (1995). It ordered the case dismissed. Otherwise it affirmed the judgment of the Nebraska Court of Appeals. *Id.* at 796. Appendix at App. 16.

The State of Nebraska then moved for a rehearing by the Nebraska Supreme Court. The motion was denied. Appendix at App. 18.

The State of Nebraska moved to recall the mandate, arguing the application of such an exclusionary rule in the present case is inconsistent with the thrust of decisions of this Court, including *Custis*, which have narrowly limited the scope of collateral attacks on prior judgments permitted as an enforcement tool. The motion was denied. Appendix at App. 19.

ARGUMENT

THE NEBRASKA SUPREME COURT HAS EXTENDED THE SCOPE OF COLLATERAL ATTACKS ON PRIOR JUDGMENTS BEYOND THE LIMITS RECOGNIZED BY THIS COURT AS NECESSARY FOR DUE PROCESS.

The right of a defendant to collaterally attack in a sentencing proceeding his uncounseled conviction offered to enhance the penalty for a subsequent conviction is well recognized. Defendant in the present case sought and received an extension of that right beyond the limits recognized by this Court.

A. *The right to counsel.*

The Sixth Amendment requires that an indigent defendant charged with a **felony** in state court proceedings have counsel appointed for him. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

A defendant charged with a **misdemeanor** has no constitutional right to counsel where no sentence of imprisonment is imposed. *Scott v. Illinois*, 440 U.S. 367 (1979).

A civil proceeding is at least one step removed from conviction of a misdemeanor when considering whether one has a right to counsel. Thus, in *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981), the Court found no absolute constitutional right of an indigent parent to appointed counsel in child termination proceedings, but held that should be decided on a case-by-case basis. Similarly, whether indigent probationers at a probation revocation hearing are entitled to appointed counsel must

be determined on a case-by-case basis. *Gagnon v. Carpelli*, 411 U.S. 778 (1973).

Thus, an indigent defendant has an absolute right to appointed counsel in proceedings where imprisonment is a direct possibility; where imprisonment is an indirect possibility, whether he has such a right will be decided on a case-by-case basis.

B. *The right of collateral attack.*

This Court recognized in *Burgett v. Texas*, 389 U.S. 109 (1967), a right of collateral attack at a sentencing proceeding on a prior conviction offered to enhance a later conviction on the ground defendant did not have or waive counsel during proceedings in the prior conviction. "To permit use of such a tainted [uncounseled] prior conviction [of an indigent for a felony] **for sentence enhancement** would undermine the principle of *Gideon*." (Emphasis added.) *Id.* at 115. "Erosion of the *Gideon* principle can be prevented here only by affirming the judgment . . . remanding this case to the trial court for reconsideration of the [defendant's] sentence." *United States v. Tucker*, 404 U.S. 443, 449 (1972).

An uncounseled misdemeanor conviction valid under *Scott* is also valid when used to enhance punishment at a subsequent conviction. *Nichols v. United States*, 511 U.S. ___, 128 L.Ed.2d 745, 755, 114 S.Ct. 1921 (1994). "Enhancement statutes, whether in the nature of criminal history provisions such as those contained in the Sentencing Guidelines, or recidivist statutes which are commonplace in state criminal laws, do not change the penalty imposed for the earlier conviction. . . . 'This Court

consistently has sustained repeat-offender laws as penalizing only the last offense committed by the defendant.'" *Id.* at 128 L.Ed.2d at 754.

In *Nichols* the Court found the petitioner, consistent with due process, could have been sentenced more severely based simply on evidence of the underlying conduct which gave rise to the previous offense. *Id.* (That is essentially what occurred in the present case where evidence of Defendant's paternity and duty to support was introduced without objection by testimony of the mothers on both direct and cross examination.)

Thus, where an indigent defendant is convicted in a criminal proceeding where he has a right to appointed counsel but does not have it or voluntarily waives it, that right will be enforced by suppressing the use of that uncounseled conviction to enhance the penalty for a subsequent conviction. If the uncounseled conviction is admitted into evidence, the remedy is to remand for resentencing on the later conviction, not to reverse either conviction.

C. *The right of collateral attack is limited to sentencing proceedings where a prior conviction is offered to enhance the penalty for a subsequent conviction.*

In *Custis*, this Court continued to uphold the right of a defendant to challenge at sentencing a prior conviction tendered for enhancement of a subsequent conviction, but only on the ground that the defendant did not have counsel or waive it during proceedings in the prior conviction. *Id.* at 128 L.Ed.2d at 528. It cited the historical

roots for such a challenge. *Id.* at 128 L.Ed.2d at 526-27. It refused to extend the right of such collateral attacks to other grounds. *Id.* at 528. It cited the need for finality of judgments and difficulties in administration in a proceeding that has an independent purpose other than to overturn the prior judgment. *Id.* at 528-29.

> By challenging the previous conviction, the defendant is asking a district court "to deprive [the] [state court judgment] of [its] normal force and effect **in a proceeding that ha[s] an independent purpose other than to overturn the prior judgmen[t].**"

(Emphasis added; insertions by the Court.) *Id.*

> The provision that a court may not count a conviction "which has been . . . set aside" creates a clear negative implication that courts *may* count a conviction that has *not* been set aside.

Id. at 525. This Court then noted other forums were available for attacking the sentences offered for enhancement on other grounds. *Id.* at 529. Those other remedies must be used to set aside the prior convictions before they can no longer be used to enhance a sentence. *Id.*

Thus, this Court in *Custis* let it be known there are limits to collateral attacks as a method of enforcing an indigent defendant's right to counsel. The same considerations militate against extending beyond enhancement hearings the right collaterally to attack an uncounseled conviction.

D. *The Nebraska Supreme Court extended collateral attacks beyond the limits recognized by this Court.*

As a means of enforcing the right to counsel in the Sixth Amendment, this Court has held evidence of prior uncounseled convictions is inadmissible at sentencing proceedings to enhance the penalty of a subsequent crime. In *Custis* this Court examined whether prior convictions in state proceedings at which defendant claimed he had had ineffective assistance of counsel could be admitted at a sentencing hearing to enhance a subsequent conviction in federal court. This Court refused to extend the exclusionary rule applied in the case of uncounseled prior convictions to other situations unless the prior conviction had been set aside in another forum.

When the Nebraska Supreme Court in *Carroll* held an indigent defendant has an absolute right to be represented by counsel in state-initiated paternity proceedings, one reason it gave was that even though a defendant's physical liberty is not *immediately* at risk in such a proceeding, criminal sanctions for nonsupport can attach later under Neb. Rev. Stat. § 28-706(1). *Id.* at 578. "In addition . . . , a determination of paternity in a state-initiated paternity suit would be res judicata and therefore not open to attack in a later proceeding involving collateral issues such as nonpayment of support." *Id.*

Carroll was a direct appeal from a determination of paternity made in a civil proceeding when the record did not show the indigent defendant was represented by counsel or waived counsel. That direct appeal was the

appropriate forum for challenging an uncounseled paternity proceeding.

However, the Defendant in the present case did not avail himself of that remedy. Instead, several years after the determinations of paternity and orders of support were entered against him in civil proceedings where the record did not show he had counsel or was advised of his right to counsel, he now claims the constitution therefore bars the use of those orders in the criminal proceeding brought to enforce them. The district court overruled his objections and received the final judgments in the paternity proceedings as evidence of an element of the crime. A jury found Yelli guilty as charged and the Defendant was convicted. In his direct appeal to the Nebraska Court of Appeals from that conviction, Yelli claimed only that the trial court had erred in admitting evidence from the past civil paternity actions in which he either did not have an attorney or waive the right to an attorney. That court was persuaded by Yelli's analogy to enhancement hearings and found the evidence inadmissible.

The Nebraska Supreme Court sustained the State's petition for further review. In its opinion issued after that review it declared "a mere challenge to the admissibility of a prior judgment as evidence in a subsequent trial does not constitute an attack on the validity of the prior judgment" and concluded Yelli had not collaterally attacked the prior judgments but "simply objected to their admissibility as evidence of the essential elements of the criminal nonsupport charges filed against him." *State v. Yelli*, 247 Neb. 785, 789, 530 N.W.2d 250 (1995). It found "unreliable" and, therefore, inadmissible a judgment in a state-initiated paternity proceeding in which the record did not disclose that

the defendant had counsel or waived it. *Id.* at 792-95. It affirmed the judgment of the Nebraska Court of Appeals finding it was error to admit the judgment in that paternity proceeding into evidence during a trial for criminal nonsupport for violating a court order of support. *Id.* at 796. (Appendix at App. 16.)

Notwithstanding the disclaimer of the Nebraska Supreme Court that it was not allowing Yelli collaterally to attack the prior orders in the state-initiated paternity actions, the distinction it drew was one without a difference. For all practical purposes there remained no way to enforce those prior judgments. The Court itself recognized that when it ordered the judgment not merely vacated, but the case dismissed.

Contrary to *Custis*, the Nebraska Supreme Court has permitted Yelli to attack prior civil orders offered as evidence in a criminal action having an independent purpose other than the overturning of those prior judgments. Contrary to *Custis* the Nebraska Supreme Court has allowed Yelli to attack those prior orders in an action other than a sentencing proceeding in which the prior judgments were offered to enhance the penalties in a subsequent conviction. Contrary to *Custis* the Nebraska Supreme Court has allowed Yelli to challenge final orders that had not been set aside in another proper forum and the time for doing so has long since passed.

Custis is well-grounded in prior holdings of this Court and has signaled an intention not to expand the grounds or proceedings in which uncounseled convictions can be attacked. Thus, the decision of the Nebraska

Supreme Court in the present case is inconsistent with *Custis* and decisions of this Court.

CONCLUSION

The State of Nebraska urges this Court to grant its petition for a writ of certiorari to the Nebraska Supreme Court because it has decided a federal question in a way that conflicts with applicable decisions of this Court.

Respectfully submitted,

DON STENBERG
Attorney General

MARILYN B. HUTCHINSON
Assistant Attorney General
Counsel of Record
P.O. Box 98920
Lincoln, Nebraska 68509-8920
Tel: (402) 471-2682

STATE OF NEBRASKA, APPELLEE, V. JOHN W. YELLI, APPELLANT.

___N.W.2d___

Filed April 7, 1995, No. S-94-206.

1. **Paternity: Proof.** In a civil action, only a preponderance of the evidence is necessary to sustain the establishment of paternity.

2. **Criminal Law: Proof.** The burden in a criminal proceeding is to produce proof beyond a reasonable doubt of every element of a charged offense.

3. **Res Judicata: Collateral Estoppel: Proof.** The doctrines of res judicata and collateral estoppel are not applicable when the burden of persuasion is different in the subsequent proceeding.

4. **Issue Preclusion: Proof.** A party who has carried the burden of establishing an issue by a preponderance of the evidence is not entitled to assert preclusion in a later action that requires proof of the same issue by a higher standard.

5. **Res Judicata: Actions: Judgments.** An acquittal or dismissal in a prior criminal prosecution is no bar to the prosecution of a later civil action, and such acquittal or dismissal concludes no issues in a later civil action.

6. **Juvenile Courts: Jurisdiction: Criminal Law.** A parent's conduct may be grounds for a juvenile court to acquire jurisdiction notwithstanding that the parent was acquitted of a criminal charge for conduct detrimental to the child.

7. **Res Judicata: Paternity: Child Support.** A judgment in a civil paternity adjudication is res judicata as between the same parties in a subsequent civil action such as a support modification proceeding.

8. **Due Process: Right to Counsel: Paternity.** Both federal and state due process dictate that an indigent defendant in a state-assisted civil paternity action has the right to the services of appointed counsel.

9. **Right to Counsel: Records: Presumptions: Appeal and Error.** Where a record is silent as to a defendant's opportunity for counsel, an appellate court may not presume that such rights were respected.

10. **Right to Counsel: Paternity: Criminal Law: Evidence.** A civil paternity adjudication obtained in a state-initiated proceeding in which the defendant was denied the right to counsel lacks the reliability that warrants its admission in a criminal proceeding.

11. **Paternity: Proof.** A mother's testimony that one is the father of her child is sufficient only if she be corroborated as to material facts and circumstances which tend to support her testimony and from which, together with her testimony as to the principal act, the inference of paternity may be drawn.

12. **Double Jeopardy.** The Double Jeopardy Clauses of the federal and state Constitutions forbid a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding.

13. **Double Jeopardy: Appeal and Error.** While the Double Jeopardy Clauses of the federal and state Constitutions do not protect against a second prosecution for the same offense where a conviction is reversed for trial error, they bar retrial if the reversal is necessitated because the evidence was legally insufficient to sustain the conviction.

Petition for further review from the Nebraska Court of Appeals, CONNOLLY, IRWIN, and MILLER-LERMAN, Judges, on appeal thereto from the District Court for Holt County,

WILLIAM CASSEL, Judge. Judgment of Court of Appeals affirmed as modified.

John Jedlicka, Holt County Public Defender, for appellant.

Don Stenberg, Attorney General, and Marilyn B. Hutchinson for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, and WRIGHT, JJ.

CAPORALE, J.

I. STATEMENT OF CASE

The plaintiff-appellee, State of Nebraska, charged the defendant-appellant, John W. Yelli, with two counts of criminal nonsupport of two minor children, in violation of Neb. Rev. Stat. § 28-706 (Reissue 1989). More specifically, the State claims that Yelli failed to make the support payment he was previously ordered to make in each of two separate state-initiated civil paternity actions in which he was determined to be the father of the minor who was the subject of each action. Pursuant to verdict, the district court adjudged Yelli guilty as charged and imposed sentence. Yelli then appealed to the Nebraska Court of Appeals, urging that as there had been no showing that he had either been represented by or waived counsel in the paternity actions, the district court erred in receiving the prior adjudications in evidence over his objection. The Court of Appeals agreed and thus vacated the judgment of the district court. *State v. Yelli*, 3 Neb. App. 148, 524 N.W.2d 353 (1994). The State thereafter successfully petitioned this court for further review,

asserting, in summary, that the Court of Appeals erroneously (1) ruled the prior adjudications to have been inadmissible, (2) concluded that the evidence did not otherwise support the verdicts, and (3) determined to vacate the judgment of the district court. We now modify, and as modified affirm, the judgment of the Court of Appeals.

II. SCOPE OF REVIEW

A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State is sufficient to support that verdict. *State v. Dyer,* 245 Neb. 385, 513 N.W.2d 316 (1994). However, an appellate court has an obligation to reach conclusions of law independent of those of the inferior courts. See *Jindra v. Clayton, ante* p. 597, ___ N.W.2d ___ (1995).

III. FACTS

In addition to the evidence detailed in part I above, the mother of one of the minors in question testified that her child was born on November 12, 1982; that although she had never been married to Yelli, she engaged in sexual intercourse with him at some unspecified time; and that Yelli was her child's father. This mother further testified, over Yelli's objection, that she had been involved in a prior paternity adjudication and that Yelli was ordered to pay child support.

The mother of the other minor testified that the child was born on January 22, 1986. This second mother also testified that although she had never married Yelli, he

was her child's father. Over Yelli's objection, she testified in addition that the court previously had determined that Yelli was the child's father and had ordered him to pay child support.

IV. ANALYSIS

Section 28-706(1) provides: "Any person who intentionally fails, refuses, or neglects to provide proper support which he or she knows or reasonably should know he or she is legally obliged to provide to a . . . minor child . . . commits criminal nonsupport." The offense is a felony if the nonsupport is in violation of any order of any court, § 28-706(7); otherwise, the offense is a misdemeanor, § 28-706(6).

1. Admissibility of Prior Adjudications

In the context of the charges in this case, the requirement of § 28-706(1) that one know or reasonably should know that one has an obligation to support a minor child makes an adjudication that Yelli is the father of the minor whose support is at issue an essential element of each of the crimes charged. In addition, the requirement of § 28-706(7) that there be in existence a court order directing support makes such order an essential element of the crime.

(a) Noncollateral Attack

The State urges that Yelli cannot be permitted to collaterally attack the final adjudications of paternity and support entered in the prior civil paternity actions.

Clearly, collateral attack on a previous judgment is impermissible unless the attack is grounded upon lack of jurisdiction over the parties or subject matter. *VonSeggern v. Willman,* 244 Neb. 565, 508 N.W.2d 261 (1993); *In re Interest of C.W. et al.,* 239 Neb. 817, 479 N.W.2d 105 (1992); *Shade v. Kirk,* 227 Neb. 775, 420 N.W.2d 284 (1988); *State ex rel. Ritthaler v. Knox,* 217 Neb. 766, 351 N.W.2d 77 (1984); *State v. Reuter,* 216 Neb. 325, 343 N.W.2d 907 (1984); *Griffin v. Vandersnick,* 210 Neb. 590, 316 N.W.2d 299 (1982). Even if erroneous, a judgment is not subject to collateral attack unless it is void, such as would be the case where a judgment is entered without jurisdiction over the person or subject matter. *VanDeWalle v. Albion Nat. Bank,* 243 Neb. 496, 500 N.W.2d 566 (1993).

But a mere challenge to the admissibility of a prior judgment as evidence in a subsequent trial does not constitute an attack on the validity of the prior judgment. Yelli has not asserted that the courts entering the prior civil adjudications of paternity lacked jurisdiction, nor has he challenged the validity of the adjudications. Therefore, Yelli has not collaterally attacked the prior adjudications; he has simply objected to their admissibility as evidence of the essential elements of the criminal nonsupport charges filed against him.

(b) No Issue or Claim Preclusion

With such distinction in mind, it is necessary to consider whether a prior civil adjudication of paternity and concurrent order of support are admissible in a subsequent criminal nonsupport trial as evidence of the elements of the criminal offense.

It must be borne in mind that in a civil action, only a preponderance of the evidence is necessary to sustain the establishment of paternity. *Gregory v. Davis*, 214 Neb. 408, 334 N.W.2d 1 (1983); *Snay v. Snarr*, 195 Neb. 375, 238 N.W.2d 234 (1976); Neb. Rev. Stat. § 43-1412 (Reissue 1993). In contrast, the burden in a criminal proceeding is to produce proof beyond a reasonable doubt of every element of a charged offense. *State v. McHenry, ante* p. 167, 525 N.W.2d 620 (1995).

Traditionally, judgments have been regarded as hearsay and not within any exception to the hearsay rule; a prior judgment is hearsay, since it is based on the opinion of a judge or jury consisting of persons who have not been cross-examined and have no personal knowledge of the underlying facts. Hiroshi Motomura, *Using Judgments as Evidence*, 70 Minn. L. Rev. 979 n.4 (1986), citing 4 Jack B. Weinstein & Margaret A. Berger, Weinstein's Evidence ¶ 803(22)[01] (1995). Courts had therefore been unwilling to admit prior judgments into evidence. McCormick on Evidence § 298 (John W. Strong 4th ed. 1992). As a consequence, doctrines of claim and issue preclusion, res judicata, and collateral estoppel have developed, which allow for the admission of prior judgments in a subsequent proceeding.

However, the doctrines of res judicata and collateral estoppel are not applicable when the burden of persuasion is different in the subsequent proceeding. See 18 Charles A. Wright et al., Federal Practice and Procedure § 4422 (1981). Consequently, a party who has carried the burden of establishing an issue by a preponderance of the evidence is not entitled to assert preclusion in a later

action that requires proof of the same issue by a higher standard. *Id.*

Restatement (Second) of Judgments § 28 at 273 (1982) provides:

> Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances:
>
> . . . [.]
>
> (4) The party against whom preclusion is sought had a significantly heavier burden of persuasion with respect to the issue in the initial action than in the subsequent action; the burden has shifted to his adversary; or the adversary has a significantly heavier burden than he had in the first action.

To apply issue preclusion in the cases described in subsection (4) of the Restatement would be to hold, in effect, that the losing party in the first action would also have lost had a significantly different burden been imposed. The Restatement, *supra*, comment *f*. While there may be many occasions when such a holding would be correct, there are many others in which the allocation and weight of the burden of persuasion (or burden of proof) are critical in determining who should prevail. *Id.* Since the process by which the issue was adjudicated cannot be reconstructed on the basis of a new and different burden, preclusive effect is properly denied. *Id.* See, *Grogan v. Garner*, 498 U.S. 279, 111 S. Ct. 654, 112 L. Ed. 2d 755 (1991) (a judgment for fraud won by preponderance of evidence

standard would not support preclusion in proceedings to establish nondischargeability if standard in subsequent bankruptcy proceedings required proof by clear and convincing evidence): *In re Braen*, 900 F.2d 621 (3d Cir. 1990), *cert. denied* 498 U.S. 1066, 111 S. Ct. 782, 112 L. Ed. 2d 845 (1991) (issue preclusion not available if state jury finding of malicious intent based on preponderance of evidence rested on lower standard of proof than judgment creditor must meet in establishing malice to avoid discharge of debt in bankruptcy); *General Dynamics Corp. v. American Tel. & Tel. Co.*, 650 F. Supp. 1274 (N.D. Ill. 1986) (changes in burden of proof may defeat collateral estoppel).

Thus, we have held that an acquittal or dismissal in a prior criminal prosecution is no bar to the prosecution of a later civil action, and such acquittal or dismissal concludes no issues in a later civil action. *State ex rel. Douglas v. Morrow*, 216 Neb. 317, 343 N.W.2d 903 (1984). Similarly, in *In re Interest of D.M.B.*, 240 Neb. 349, 481 N.W.2d 905 (1992), we determined that because of the different standards of proof, a parent's conduct may be grounds for a juvenile court to acquire jurisdiction notwithstanding that the parent was acquitted of a criminal charge for conduct detrimental to the child.

Therefore, the doctrines of res judicata and collateral estoppel are not applicable as bases for the admission of prior civil judgments in a subsequent criminal trial. Specifically, the judgment in a civil paternity action is not binding under the doctrines of res judicata or collateral estoppel in a subsequent criminal case. *Nordgren v. Mitchell*, 716 F.2d 1335 (10th Cir. 1983).

However, as suggested in *Carroll v. Moore*, 228 Neb. 561, 423 N.W.2d 757 (1988), *cert. denied* 488 U.S. 1019, 109 S. Ct. 817, 102 L. Ed. 2d 807 (1989), because the burdens of proof would be the same, a judgment in a civil paternity adjudication is res judicata as between the same parties in a subsequent civil action such as a support modification proceeding. See, *DeVaux v. DeVaux*, 245 Neb. 611, 514 N.W.2d 640 (1994); *Callison v. Naylor*, 108 N.M. 674, 777 P.2d 913 (N.M. App. 1989); *Spindlow v. Spindlow*, 512 So. 2d 918 (Ala. App. 1987), *cert. denied* 512 So. 2d 921; *State ex rel. Mart v. Mart*, 380 N.W.2d 604 (Minn. App. 1986); *Hackley v. Hackley*, 426 Mich. 582, 395 N.W.2d 906 (1986); *In re Marriage of Detert*, 391 N.W.2d 707 (Iowa App. 1986); *McCrary v. McCrary*, 408 So. 2d 523 (Ala. App. 1981).

(c) Not Otherwise Reliable

Therefore, we must determine whether the prior civil adjudications are admissible in this instance notwithstanding that the doctrines of res judicata or collateral estoppel do not apply.

Although a judgment is technically hearsay, for which no specific exception is provided, courts have nonetheless admitted judgments as evidence in subsequent proceedings when the prior judgment possessed the evidentiary reliability that the hearsay rule seeks to promote. See *Eagle, etc., Ins. Co. v. Heller*, 149 Va. 82, 140 S.E. 314 (1927) (prior criminal conviction for arson admissible in subsequent civil action to determine whether insured could recover under fire insurance policy). See, also, *Williams v. Bennett*, 689 F.2d 1370 (8th Cir. 1982), *cert.*

denied 464 U.S. 932, 104 S. Ct. 335, 78 L. Ed. 2d 305 (1983); *Indiana State Highway Commission v. Rickert*, 425 N.E.2d 620 (Ind. 1981).

The hearsay rule is directed against the danger that evidence which is untested by the traditional conditions present when a witness testifies at trial will be unreliable because faults in the perception, memory, and narration of the declarant will not be exposed. 4 Jack B. Weinstein and Margaret A. Berger, Weinstein's Evidence ¶ 800[01] (1995). Historically, three conditions are believed to cause the witnesses to be accurate and to expose inaccuracies in perception, memory, or narration when a witness testifies at trial: the oath, personal presence at the trial, and cross-examination. *Id.;* McCormick on Evidence § 245 (John W. Strong 4th ed. 1992).

When these conditions are not met, the traditional indicia of reliability are lacking, and such evidence is inadmissible unless there are equivalent guarantees of trustworthiness. Neb. Evid. R. 803(22), Neb. Rev. Stat. § 27-803(22) (Reissue 1989). See, *In re Estate of Schoch*, 209 Neb. 812, 311 N.W.2d 903 (1981) (reliability of witness' testimony that hearsay statement was made not to be considered in deciding admissibility; consideration is circumstantial guarantees of trustworthiness of statement being reported); *United States v. American Tel. & Tel. Co.*, 498 F. Supp. 353 (D.C. 1980) (rationale for admissibility of factual findings contained in public records is their fundamental trustworthiness); *Frazier v. Continental Oil Co.*, 568 F.2d 378 (5th Cir. 1978) (dangers inherent in hearsay testimony can be obviated by requirement that such statements be trustworthy and necessary); *Sabatino v. Curtiss National Bank of Miami Springs*, 415 F.2d 632 (5th Cir.

1969), *cert. denied* 396 U.S. 1057, 90 S. Ct. 750, 24 L. Ed. 2d 752 (1970) (evidence must be necessary and exhibit intrinsic probability of trustworthiness); *Mid-City Bank & Trust Co. v. Reading Co.*, 3 F.R.D. 320 (D.N.J. 1944) (rules of evidence designed to obtain truth and intended to exclude unreliable testimony).

Typically, the circumstances surrounding a civil adjudication support the reliability of the judgment. Therefore, we have admitted evidence concerning prior civil adjudications in subsequent criminal proceedings even though such prior judgments were not received as conclusive proof of the issue in question. Evidence of prior civil adjudications has been admitted in a subsequent criminal nonsupport proceeding to establish the defendant's obligation to support the child. *State v. Menuey*, 239 Neb. 513, 476 N.W.2d 846 (1991); *State v. Beck*, 238 Neb. 449, 471 N.W.2d 128 (1991); *State v. Bright*, 238 Neb. 348, 470 N.W.2d 181 (1991); *State v. Meyer*, 236 Neb. 253, 460 N.W.2d 656 (1990); *State v. Eichelberger*, 227 Neb. 545, 418 N.W.2d 580 (1988); *State v. McGee*, 221 Neb. 557, 378 N.W.2d 674 (1985); *State v. McKichan*, 219 Neb. 560, 364 N.W.2d 47 (1985); *State v. Reuter*, 216 Neb. 325, 343 N.W.2d 907 (1984); *State v. Munn*, 212 Neb. 265, 322 N.W.2d 429 (1982); *State v. Englehaupt*, 210 Neb. 182, 313 N.W.2d 437 (1981).

Similarly, other jurisdictions have determined that evidence of a prior civil adjudication of paternity is admissible against the defendant in a subsequent criminal nonsupport proceeding. However, in such jurisdictions the defendant is not estopped from denying paternity in the subsequent criminal proceeding. Thus,

the prior civil adjudications are admitted as nonconclusive evidence of the defendant's support obligation. See, *State v. Hoy*, 742 S.W.2d 206 (Mo. App. 1987) (due process violated in criminal nonsupport action when court denied defendant's pretrial request for blood tests to contest paternity due to preclusive effect given to civil decree of dissolution); *County of El Dorado v. Schneider*, 191 Cal. App. 3d 1263, 237 Cal. Rptr. 51 (1987) (prior adjudication of paternity would not allow trial court to withhold question of paternity from jury); *Patterson v. Municipal Court*, 232 Cal. App. 2d 289, 42 Cal. Rptr. 769 (1965) (interlocutory divorce decree determining husband was father of child not res judicata against husband in subsequent prosecution for nonsupport).

However, in the present case, the prior paternity adjudications lack reliability because they do not affirmatively show that Yelli was represented by or waived his right to counsel. Recognizing the risk of error should an indigent paternity defendant go unrepresented, that counsel was necessary to inform the defendant of his right to a jury trial as well as his right to blood testing, and that the use of scientific evidence involved in blood testing contributed to the complexity of the litigation and the risk of error when the defendant was unassisted, we, in *Carroll v. Moore*, 228 Neb. 561, 423 N.W.2d 757 (1988), *cert. denied* 488 U.S. 1019, 109 S. Ct. 817, 102 L. Ed. 2d 807 (1989), concluded that both federal and state due process dictate that an indigent defendant in a state-assisted paternity action has the right to the services of appointed counsel.

Where a record is silent as to a defendant's opportunity for counsel, an appellate court may not presume

that such rights were respected. *State v. Ristau*, 245 Neb. 52, 511 N.W.2d 83 (1994); *State v. Smith*, 213 Neb. 446, 329 N.W.2d 564 (1983).

Since the record in the prior paternity adjudications is silent, we cannot assume that Yelli was represented by or waived his right to counsel in the prior paternity proceedings. When a paternity defendant is denied the opportunity for the assistance of counsel in a state-initiated paternity proceeding, the risk of error is substantial. Such an uncounseled paternity adjudication lacks the circumstantial guarantees of trustworthiness that other judgments possess. Therefore, a civil paternity adjudication obtained in a state-initiated proceeding in which the defendant was denied the right to counsel lacks the reliability that warrants its admission in a criminal proceeding.

It necessarily follows therefrom that the adjudications in the prior civil paternity actions should not have been received in evidence in this proceeding, and the mothers should not have been permitted to testify concerning them. There is thus no merit to the State's first assignment of error.

2. Sufficiency of Other Evidence

Next, the State urges that even without proof of the prior determinations of paternity and orders of support, there existed sufficient evidence to support the jury's verdict. However, that contention overlooks that excluding any evidence of the prior adjudications, the record consists of nothing more than the uncorroborated testimony of each minor's mother that Yelli was the father. A

mother's testimony that one is the father of her child is sufficient only if she be corroborated as to material facts and circumstances which tend to support her testimony and from which, together with her testimony as to the principal act, the inference of paternity may be drawn. § 43-1412. See, *Wade v. Hicks,* 191 Neb. 847, 218 N.W.2d 222 (1974); *Lockman v. Fulton,* 162 Neb. 439, 76 N.W.2d 452 (1956); *State ex rel. Klostermeier v. Klostermeier,* 161 Neb. 247, 72 N.W.2d 848 (1955). Here, there was nothing which corroborated the mothers' bald assertions of paternity; the mothers' testimony is thus insufficient to establish paternity and the resulting obligation to pay.

As a consequence, there was a complete failure of proof to support the charges against Yelli, and there is no merit to the State's second assignment of error.

3. Vacation of Judgment

The State reads the judgment of the Court of Appeals to mean that the within cause has been dismissed. Although it is not entirely clear to us that the mere vacation of the district court's judgment achieves that end, we determine that such is indeed the result which must obtain.

It is clear that the Double Jeopardy Clauses of the federal and state Constitutions forbid a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding. *Burks v. United States,* 437 U.S. 1, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978); *State v. Bostwick,* 222 Neb. 631, 385 N.W.2d 906 (1986). Thus, while the Double Jeopardy Clauses do not protect against a second prosecution

for the same offense where a conviction is reversed for trial error, they bar retrial if the reversal is necessitated because the evidence was legally insufficient to sustain the conviction. *Burks v. United States, supra; Palmer v. Grammer,* 863 F.2d 588 (8th Cir. 1988), *appeal after remand, Palmer v. Clarke,* 961 F.2d 771 (8th Cir. 1992); *State v. Lenz,* 227 Neb. 692, 419 N.W.2d 670 (1988); *State v. Palmer,* 224 Neb. 282, 399 N.W.2d 706 (1986), *cert. denied* 484 U.S. 872, 108 S. Ct. 206 98 L. Ed. 2d 157 (1987).

The third and last of the State's assignments of error is therefore also meritless.

V. JUDGMENT

Accordingly, we modify the judgment of the Court of Appeals as hereinafter stated and as thus modified affirm it; the cause is remanded to the Court of Appeals with the direction that it reverse the judgment of the district court and remand the cause to that court with the direction that it dismiss the within action.

AFFIRMED AS MODIFIED.

CONNOLLY, J., not participating.

NEBRASKA SUPREME COURT
AND NEBRASKA COURT OF APPEALS
OFFICE OF THE CLERK
P.O. BOX 98910
2413 State Capitol Building
Lincoln, Nebraska 68509
(402) 471-3731

December 21, 1994

Marilyn B. Hutchinson
ATTORNEY GENERAL'S OFFICE
2115 State Capitol
Lincoln, NE 68509

IN CASE OF: S-94-0206, State v. John W. Yelli

Pet Appellee for Further Review & Brf filed 12/01/94 **has been reviewed by the court and the following order entered:**

Petition for further review sustained; case to appear on the next proposed call of the Nebraska Supreme Court. Parties ordered to supply the court with 7 additional copies of original briefs, petitions for further review, and responses thereto previously filed. Any further briefing pursuant to Supreme Court Rule 2G left to the discretion of the parties.

Respectfully,

CLERK OF THE SUPREME COURT
AND COURT OF APPEALS

NEBRASKA SUPREME COURT
AND NEBRASKA COURT OF APPEALS
OFFICE OF THE CLERK
P.O. BOX 98910
2413 State Capitol Building
Lincoln, Nebraska 68509
(402) 471-3731

May 17, 1995

Marilyn B. Hutchinson
ATTORNEY GENERAL'S OFFICE
2115 State Capitol
Lincoln, NE 68509

IN CASE OF: S-94-0206, State v. John W. Yelli

Appellee/Motion for Rehearing & Brf **filed** 04/11/95 **has been reviewed by the court and the following order entered:** Motion of appellee for rehearing overruled.

Respectfully,

CLERK OF THE SUPREME COURT
AND COURT OF APPEALS

NEBRASKA SUPREME COURT
AND NEBRASKA COURT OF APPEALS
OFFICE OF THE CLERK
P.O. BOX 98910
2413 State Capitol Building
Lincoln, Nebraska 68509
(402) 471-3731

May 25, 1995

Marilyn B. Hutchinson
ATTORNEY GENERAL'S OFFICE
2115 State Capitol
Lincoln, NE 68509

IN CASE OF: S-94-0206, State v. John W. Yelli

Appe Mot to Recall Mandate **filed** 05/23/95 **has been reviewed by the court and the following order entered:** Overruled.

Respectfully,

CLERK OF THE SUPREME COURT
AND COURT OF APPEALS

STATE OF NEBRASKA, APPELLEE, V. JOHN W. YELLI, APPELLANT.
___N.W.2d___

Filed November 8, 1994. No.A-94-206.

1. **Verdicts: Appeal and Error.** A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that verdict. Moreover, on such a claim, an appellate court will not set aside a guilty verdict in a criminal case where such verdict is supported by relevant evidence.

2. **Judgments: Appeal and Error.** Regarding matters of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court in a judgment under review.

3. **Paternity: Right to Counsel.** In a State-initiated paternity adjudication, the trial court must make an initial determination regarding whether the defendant is indigent and whether the defendant should be appointed counsel.

4. **Final Orders: Paternity: Collateral Attack.** Collateral attacks on the final orders of prior paternity adjudications in subsequent proceedings are not permissible.

5. **Paternity: Right to Counsel.** A defendant in a State-initiated paternity action has an absolute right to be represented by counsel.

6. **Paternity: Right to Counsel: Waiver: Proof.** If the record does not affirmatively show that the defendant was represented by or waived his right to counsel in a prior State-initiated paternity adjudication, then the same defendant in a subsequent criminal nonsupport action may object to the use of the prior paternity adjudication as evidence of paternity.

Appeal from the District Court for Holt County: WILLIAM CASSEL, Judge. Reversed and vacated.

John Jedlicka, Holt County Public Defender, for appellant.

Don Stenberg, Attorney General, and Marilyn B. Hutchinson for appellee.

CONNOLLY, IRWIN, and MILLER-LERMAN, Judges.

CONNOLLY, Judge.

John W. Yelli appeals his convictions for criminal nonsupport on the grounds that the trial court erroneously admitted evidence in the form of records from past paternity cases, in which Yelli was adjudged to be the father of the two children in question and ordered to pay child support. Yelli argues that those prior adjudications should not have been admitted into evidence because he was not afforded his constitutional right to counsel in those prior proceedings. We reverse and vacate Yelli's convictions. The records of the prior paternity adjudications should not have been admitted as evidence to establish his paternity in this criminal nonsupport action because the records of the prior adjudications do not affirmatively show that Yelli was informed of his right to counsel, that Yelli had counsel, or that Yelli waived counsel.

I. BACKGROUND

John W. Yelli was convicted by a jury on two charges of criminal nonsupport, a Class IV felony. The first charge arose from a December 27, 1988, order of the Holt County District Court in State ex rel. Beauchamp v. Yelli, case No.

18619, in which Yelli was adjudicated the father of and ordered to pay support for his alleged son, DeWayne Beauchamp. The second charge also arose from an order of the Holt County District Court, in State ex rel. Sobotka v. Yelli, case No. 18763, filed April 7, 1989, in which Yelli was adjudicated the father of and ordered to pay support for his alleged daughter, Christina R. Sobotka. Both of the above-referenced cases were State-initiated paternity actions.

Charges were filed in the instant case because Yelli failed to meet his child support payment obligations, in violation of Neb. Rev. Stat. § 28-706 (Reissue 1989). The child support payments at issue in the instant case arose from the above-mentioned Holt County District Court adjudications. Yelli filed a motion in limine, seeking to prohibit the State from introducing into evidence any records of those adjudications. As the basis for his motion in limine, Yelli argued that the court in the prior adjudications failed to offer him appointed counsel and that he never waived his constitutional right to counsel. Therefore, Yelli contends, the orders issued in those cases were unconstitutional, and any records of those proceedings should not have been admissible in the instant case. After a hearing on the motion in limine, the trial court denied the motion.

At trial, the mother of each child testified that Yelli was the father of her respective child. The State introduced the records from the prior paternity adjudications into evidence during the testimony of the mothers, over Yelli's objections. The jury was allowed to consider all the evidence and returned a verdict of guilty on both counts.

II. ASSIGNMENT OF ERROR

Yelli's only assignment of error is that the trial court erred in admitting evidence from the prior paternity adjudications, where Yelli did not have counsel and did not waive his right to counsel.

III. STANDARD OF REVIEW

[1,2] A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that verdict. Moreover, on such a claim, an appellate court will not set aside a guilty verdict in a criminal case where such verdict is supported by relevant evidence. *State v. Dyer,* 245 Neb. 385, 513 N.W.2d 316 (1994); *State v. Cook,* 244 Neb. 751, 509 N.W.2d 200 (1993); *State v. White,* 244 Neb. 577, 508 N.W.2d 554 (1993). Regarding matters of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court in a judgment under review. *State v. Roche, Inc.,* 246 Neb. 568, 520 N.W.2d 539 (1994); *White, supra.*

IV. ANALYSIS

Yelli complains that the records of the prior paternity adjudications, in which Yelli was found to be the father of the children in question and ordered to pay child support, should not have been admitted into evidence in the instant case because Yelli was not afforded counsel and did not waive his right to counsel in those prior adjudications.

As the primary basis of support for his argument, Yelli cites *Carroll v. Moore*, 228 Neb. 561, 423 N.W.2d 757 (1988), *cert. denied* 488 U.S. 1019, 109 S.Ct. 817, 102 L. Ed. 2d (1989). *Carroll* was a paternity action in which the defendant, the purported father of the child in question, was denied counsel in spite of his indigent status. The Nebraska Supreme Court in *Carroll* held that "due process requires that an *indigent* defendant has an absolute right to court-appointed counsel in state-initiated paternity proceedings." (Emphasis supplied.) 228 Neb. at 579, 423 N.W.2d at 767. In the instant case, Yelli argues that *Carroll* mandates a finding that the prior State-initiated paternity adjudications involving Yelli were unconstitutionally decided and, therefore, that the records of those adjudications should be inadmissible in the present action.

Yelli is correct inasmuch as he argues that *Carroll* directs that indigent defendants must be afforded court-appointed counsel in State-initiated paternity adjudications. However, Yelli's arguments require us to determine two additional issues. First, we must decide whether the trial court in the prior paternity adjudications had a duty to affirmatively show on the record that Yelli was informed of his *Carroll* rights. Second, we must decide whether the validity of a paternity adjudication can be attacked in a subsequent criminal nonsupport proceeding.

1. Trial Court's Duty to Inform Defendant of *Carroll* Rights

In the case at bar, there is nothing in the record indicating that Yelli was indigent, and thus entitled to court-appointed counsel under *Carroll*, at the time of the prior paternity adjudications. Yelli argues that in paternity adjudications, the trial court has a duty to make a determination regarding the defendant's indigent status on the record and to determine whether counsel should be appointed for him. Yelli points to *Kennedy v. Wood*, 439 N.E.2d 1367 (Ind. App. 1982), which was relied on by the *Carroll* court for the following proposition:

> [T]he due process clause demands not only the appointment of counsel for *all* indigent paternity defendants, but also that "[b]ecause this right would be meaningless if such a defendant did not know of the right, we further hold that the court must advise the paternity defendant in this situation of his right to appointed counsel if he is indigent."

Carroll, 228 Neb. at 572, 423 N.W.2d at 763-64.

[3] Yelli argues that the cited language supports his contention that an indigent defendant's absolute right to counsel in State-initiated paternity actions is insignificant unless the defendant is advised of his right to counsel. We agree. In order to make the right to counsel mandated by *Carroll* meaningful, we hold that in a State-initiated paternity adjudication, the trial court must make an initial determination regarding whether the defendant is indigent and whether the defendant should be appointed counsel. See, *Kennedy, supra; Rees v. Heimberger*, 60 Ohio App. 3d 45, 573 N.E.2d 189 (1989), *cert. denied* 494 U.S.

1088 110 S. Ct. 1827, 108 L. Ed. 2d 956 (1990); *Rodriguez v. Rodriguez*, 410 Pa. Super. 549, 600 A.2d 589 (1991). The records of the prior paternity actions in this case reflect that the trial court in each case did not make any determination regarding Yelli's indigent status. Therefore, the trial court in each case failed to properly inform Yelli of his right to counsel under *Carroll*.

2. Attacks on Validity of Prior Paternity Adjudications

[4] At first blush, Yelli's argument regarding the admissibility of the records from the prior paternity adjudications in this criminal nonsupport proceeding appears to be a collateral attack on those prior adjudications. Collateral attacks on the final orders of prior paternity adjudications in subsequent proceedings are not permissible. *Carroll, supra.*

However, we find Yelli's analogy to criminal enhancement proceedings persuasive. In order for a defendant's prior convictions to be used to enhance the punishment for a subsequent conviction, the record must affirmatively show that the defendant was either represented by or waived his right to counsel at the proceeding where the prior conviction was had. *Burgett v. Texas*, 389 U.S. 109, 88 S. Ct. 258, 19 L. Ed. 2d 319 (1967); *State v. Smith*, 213 Neb. 446, 329 N.W.2d 564 (1983). At the enhancement proceeding, the defendant is allowed to object to the validity of the prior convictions, but only on the grounds that the defendant was neither represented by nor had waived his right to counsel, in violation of the defendant's right to counsel under the Sixth Amendment.

Convictions obtained in violation of the right to counsel are considered too unreliable to be admitted into evidence in enhancement proceedings. *Smith, supra.*

[5, 6] We hold that the same is true when past State-initiated paternity adjudications are used as evidence of paternity in criminal nonsupport proceedings. Under *Carroll,* a defendant in a State-initiated paternity action has an absolute right to be represented by counsel. If the record does not affirmatively show that the defendant was represented by or waived his right to counsel in the prior State-initiated paternity adjudication, then the same defendant is a subsequent criminal nonsupport action may object to the use of the prior paternity adjudication as evidence of paternity.

Turning to the case at bar, the records of the past paternity adjudications where Yelli was determined to be the father of the children in question did not affirmatively show that Yelli was represented by or waived his right to counsel. Yelli properly objected when the State attempted to introduce the records of the paternity adjudications into evidence. Under our holding in this case, those records were inadmissible to prove that Yelli is the father of the two children in question in the current criminal nonsupport proceeding. Had the records of the prior paternity adjudications not been admitted into evidence, the jury might have acquitted Yelli.

V. CONCLUSION

The records of the paternity adjudications where Yelli was found to be the father of the children involved in this

case should not have been admitted as evidence to establish his paternity in this criminal nonsupport action, because the records of the prior adjudications do not affirmatively show that Yelli was informed of his right to counsel, that Yelli had counsel, or that Yelli waived counsel.

REVERSED AND VACATED.

IN THE DISTRICT COURT OF
HOLT COUNTY, NEBRASKA

THE STATE OF NEBRASKA, Plaintiff, vs. JOHN W. YELLI, Defendant.	)	Case No. 19654 JOURNAL (Filed Jan. 14, 1994)

NOW on this 4th day of January, 1994, this matter came on to be heard upon the Defendant's Motion In Limine filed herein. Thomas P. Herzog, Holt County Attorney, was present for the State of Nebraska. The Defendant appeared personally with his Court appointed attorney, John Jedlicka, Holt County Public Defender. The Honorable William B. Cassel presided.

An evidentiary hearing was held. Evidence was adduced and argument was heard. The Court finds that there is no precedent to extend the guidelines found in State v. Turner, 186 Neb. 424, 183 N.W.2d 763 (1971); State v. Tweedy, 209 Neb. 649, 309 N.W.2d 94 (1981); State v. Kucera, 215 Neb. 337, 338 N.W.2d 443 (1983), and State v. Prichard, 215 Neb. 488, 339 N.W.2d 748 (1983) to a paternity judgment where the record in the civil paternity case is silent as to the exercise of the right to counsel provided in Carrol v. Moore, 228 Neb. 561, 423 N.W. 2d 757 (1988).

Accordingly, the Court overrules and denies the Defendant's Motion In Limine.

The Defendant orally moved the Court for permission to appear in civilian clothes and for an order to the Holt County Sheriff allowing the Defendant to appear at

the jury trial dressed in civilian clothes. There being no objection by the Plaintiff, said Motion is granted.

IN THE DISTRICT COURT OF HOLT COUNTY

THE STATE OF NEBRASKA, Plaintiff,	)	Case No. 19654
vs.	)	
JOHN W. YELLI, Defendant.	)	

January 4, 1994

[p. 8] THE COURT: Well, essentially the question this court faces is whether or not the procedural requirements of *State v. Turner, State v. Tweedy,* and *State v. Kucera,* as typified by *State v. Prichard,* which rights are based upon the U.S. Supreme Court decision in *Boykin v. Alabama,* which have to do with guilty pleas, extends to a paternity [p. 9] judgment. Essentially the same right to counsel exists in a paternity case, as enunciated in *Carroll v. Moore,* as exists in a criminal case. On the other hand, it is clear that only a void judgment is subject to collateral attack, and that a judgment entered on an unconstitutional statute is not absolutely void, but voidable only. Accordingly, the court finds that the right to counsel in *Carroll v. Moore* does not preclude the use of a judgment entered in a civil paternity case on a silent record, not showing either advisement of the right, waiver of the right, or any request to exercise the right in a subsequent criminal case for criminal non-support under Section 28-706(1). Essentially what the defendant is asking the court to do is to extend the rule of *Tweedy, Turner,* and *Kucera* to paternity judgments, as opposed to guilty pleas,

and there being no precedent that I am aware of extending that line of cases to paternity cases, the court is – declines to extend that requirement, and accordingly overrules and denies the Motion in Limine.

Is there anything else that we need to take up this afternoon?

* * *

Supreme Court, U.S.
FILED
SEP 14 1995
CLERK

No. 95-267

In The

Supreme Court of the United States

October Term, 1995

STATE OF NEBRASKA,

Petitioner,

v.

JOHN W. YELLI,

Respondent.

On Petition For Writ Of Certiorari To The Nebraska Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Submitted by:

VINCE KIRBY
Counsel of Record
W. Hwy. 275
P.O. Box 308
Norfolk, NE 68702-0308
(402) 371-3783

On behalf of Holt County Public Defender, counsel for Yelli in Nebraska Courts

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether there is a Federal question when a State Supreme Court renders the judgement precluding evidence based on the State hearsay statute.

TABLE OF CONTENTS

Page

Question Presented i

Table of Contents ii

Table of Authorities iii

Statement of the Case 1

Argument 1

I. THERE IS NO FEDERAL QUESTION 1

II. THE NEBRASKA SUPREME COURT ISSUED AN APPROPRIATE REMEDY FOR DEPRIVATION OF INDIVIDUALS FUNDAMENTAL RIGHT OF COUNSEL 3

A. *Custis* is not Applicable to the Case at Hand 3

B. There is no Other Meaningful Remedy for Nebraska Defendants in State Initiated Paternity Decisions if the Remedy in the Case at Hand is Thrown Out 5

CONCLUSION 6

TABLE OF AUTHORITIES

Page(s)

CASES

Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.3d 274 (1969) 3

Burgett v. Texas, 389 U.S. 109 (1967) 3, 4

Carroll v. Moore, 228 Neb. 561, 423 N.W.2d 757 (1988) 1, 2, 3, 5

Custis v. United States, 511 U.S. ___, 128 L.Ed.2d 517, 114 S.Ct. 1732 (1994) 3, 4

Gideon v. Wainwright, 372 U.S. 335 (1963) 4

Nichols v. United States, 511 U.S. ___, 128 L.Ed.2d 745, 114 S.Ct. 1921 (1994) 4, 5

STATUTES

Neb. Rev. Stat. Section 27-803(22) (Reissue 1989) 1

STATEMENT OF THE CASE

The Respondent accepts the Petitioner's Statement of the case – The Facts. Respondent does not accept Petitioner's Statement of the Case – The Federal Question. The Respondent replies to the Petitioner's "The Federal Question" in the first heading of "The Argument".

ARGUMENT

I. THERE IS NO FEDERAL QUESTION.

Respondent respectfully asserts there is no Federal Question involved in the case at hand. The sole reference to a Federal Question in the Appellant's brief comes on page 4 on the fact *Yelli* relied on *Carroll v. Moore,* 228 Neb. 561, 423 N.W.2d 757 (1988). Indeed *Carroll v. Moore,* is the governing case on which the Nebraska Supreme Court held indigent defendants have a right to Court appointed counsel in State initiated paternity cases. *Carroll* itself is a final judgement. The question presented to trial court and the Nebraska appellate courts was "What remedy was appropriate if the defendant's rights under *Carroll* were violated?" The Nebraska Supreme Court held that paternity judgements gained by State initiated petitions were inadmissable in criminal proceedings if the record did not show that the defendant had counsel or waived his right to counsel. Further, the Nebraska Supreme Court in *Yelli* held the prior judgements violated Neb. Evid. R. 803(22) Neb. Rev. Stat. Section 27-803 (22) (Reissue 1989). This is the Nebraska Statute governing hearsay exceptions. (App. 11) Since the basis of judgements was in violation

of the Nebraska evidentiary statute there is no Federal Question involved.

Petitioner asserts that *Carroll v. Moore* involved in part Federal Questions and State Questions. Respondent respectfully asserts that if Petitioner believed *Carroll* carried a Federal Question then the Petitioner should have raised any Federal Question at the time it was appropriate to appeal *Carroll v. Moore* to the United States Supreme Court. The Nebraska Supreme Court decision in *State v. Yelli* does not invoke a Federal Question.

Furthermore, (App. 19) the Petitioner's action to recall the mandate was overruled by Nebraska's High Court. The fact the motion to recall the mandate was overruled and the mandate spread means the order is already final. Given the fact the order in the case Petitioner wishes to appeal is already final, Respondent respectfully submits that the issue is moot.

Petitioner further claims there are facts from which an inference can be made that Yelli was not in fact indigent (p.5 Petitioner's Brief). Petitioner wants to use an "inference" gained from a Paternity Judgement which violated the Constitution of Nebraska. In the Paternity Judgement the Court assessed Yelli the costs. That issue was fully presented to the Nebraska Appellate Courts and given the consideration it deserved (App. 1; App. 20).

II. THE NEBRASKA SUPREME COURT ISSUED AN APPROPRIATE REMEDY FOR DEPRIVATION OF INDIVIDUAL'S FUNDAMENTAL RIGHT OF COUNSEL.

Given the fact that *Carroll v. Moore*, 228 Neb. 561, 423 N.W.2d 757 (1988), was settled law and Yelli had a right to counsel in paternity cases sought to be used as evidence against him, the Nebraska Supreme Court fashioned the best remedy that was available under the circumstances. The remedy of exclusion of paternity judgments violating *Carroll* was a legally appropriate holding.

A. *Custis* is not applicable to the case at hand.

Custis v. United States, 511 U.S. ___, 128 L. Ed.2d 517, 114 S. Ct. 1732 (1994), held that defendants in Federal sentencings could not challenge the use of state convictions for enhancement on grounds other than previously established by *Burgett v. Texas*, 389 U.S. 109 (1967). The Court in *Burgett* held that state criminal decisions which did not, on record, show the defendant had counsel or had waived his right to counsel in state proceedings, would not be admissible to increase the defendant's penalties in Federal Court. The defendant in the federal sentencing in *Custis*, wanted to challenge not the fact he had counsel in the state decision, but rather to attack the effectiveness of that counsel's representation. The United States Supreme Court stated in *Custis* that the defense could not attack state convictions in Federal Court on issues dealing with rights pursuant to *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.3d 274 (1969). The High Court stated the proper *Boykin* avenues could be

utilized through other means given the fact the defendant was still in custody. In fact, the final paragraph, *Custis v. United States* stated that the Court, in making this ruling on the relief sought in *Custis*, is in no way stating what the ruling would be if a similar issue was brought up during the appropriate remedy of Federal Habeas Corpus.

For Yelli the most encouraging aspect of *Burgett* and *Custis*, is that the issue in the case at hand far more closely resembles *Burgett* than *Custis*. The reason being, Yelli is seeking to prevent an unconstitutionally gained paternity judgement entry from being used against him. In fact, the settled law after *Burgett* is that the only way a state conviction cannot be used to increase one's penalties in Federal Court, is where that state conviction does not show on record that the defendant had counsel or waived his right to counsel. In Yelli's case that is precisely the problem with the past paternity judgments. The remedy of exclusion is used by the Nebraska Hearsay Statute. Yelli is in no way arguing that the paternity judgements should be excluded for any reason other than he did not have counsel in the prior paternity judgements nor waive his right to counsel.

The Petitioner also relies on *Nichols v. United States*, 511 U.S. ___, 128 L. Ed.2d 745, 114 S. Ct. 1921 (1994). In *Nichols* the United States Supreme Court had held that a State misdemeanor case where the defendant did not receive jail may be used even if the defendant did not have counsel or waive that right. In that misdemeanor case the defendant did not receive jail. Thus there was no right under *Gideon v. Wainwright*, 372 U.S. 335 (1963), and its progeny to have counsel to begin with. The settled law

is one only has a right to counsel in crimes that are felonies and in misdemeanor crimes where jail is the result. Therefore, in *Nichols* it is not surprising at all the Court held that a misdemeanor which did not incur the sentence of jail could be used for enhancement even if the defendant was not represented by or waived the right to counsel. Clearly, in Yelli the settled Nebraska Law in *Carroll v. Moore* required Yelli unconditionally to have counsel or have waived that right.

B. There is No Other Meaningful Remedy for Nebraska Defendants in State Initiated Paternity Decisions if the Remedy in the Case at Hand is Thrown Out.

Petitioner asserts that Yelli had to have appealed his denial of counsel in the paternity judgements before the judgements became final in order to have any remedy (p. 12 Petitioner's Brief). The question then becomes "how is an indigent defendant who could have a right to counsel in a state initiated paternity decision, going to perform the complicated procedures of perfecting an appeal and preserving the issue through the appellate process?" Especially when the defendant is not even explained that he has the right to counsel. In *Carroll* the Nebraska Supreme Court held that proceedings were complicated enough that one needs counsel during the proceedings. How reasonable can it be then to expect a pro se defendant to be able to adequately represent himself through an appellate process. Clearly, if the defendant can represent himself adequately through the appellate process, he

probably is competent enough to represent himself in the trial proceedings itself.

CONCLUSION

John W. Yelli urges this Court to deny the petition for writ of certiorari to the United States Supreme Court since there is not a Federal Question involved.

Respectfully submitted,

VINCE KIRBY
Counsel of Record
W. Hwy. 275
P.O. Box 308
Norfolk, NE 68702-0308
Tel: (402) 371-3783

On behalf of Holt County Public Defender, counsel for Yelli in Nebraska Courts